PUBLIC PROSECUTOR

v.

SADDALI BIN SARIOL & ANOR.

HIGH COURT, TAWAU
DATUK JOHN CHONG YIK LIONG J.
[CRIMINAL TRIAL NO. 23 OF 1987]
16 OCTOBER 1991

DANGEROUS DRUGS: Trafficking - Police informer - Common intention - Failure to cross-examine - Effect of it.

Pursuant to a "buy-operation" both the Accused were arrested for selling cannabis weighing 776.78 grammes to a police inspector who was to be the purported buyer of the cannabis. According to the police both the Accused attempted to run when they ambushed and arrested them. The first Accused was holding a plastic bag that contained the cannabis. The second Accused was involved in the sale of the cannabis.

During the trial, the prosecution witnesses were not cross-examined on the crucial part of the case which were alleged to form part of the defence.

Held:

[1] Failure or omission to cross-examine the prosecution witnesses on the crucial part allegedly forming part of the defence is tantamount to an acceptance of the witness's testimony. And in addition, it has also adversely affected the credibility of the Accused persons on the matter now raised in their defence.

[2] On the evidence considered as a whole the prosecution has proved beyond a reasonable doubt that the first Accused was trafficking in 776.78 grammes of cannabis. His evidence has not raised any reasonable doubt as to the truth of the case for the prosecution; nor has it on the balance of probabilities rebutted the presumption raised against him under s. 37(d) and (da).

[3] The fact that the second Accused had requested ASP Lim for a deposit at the cemetery at which the delivery was agreed to be made, and the fact that the first Accused left after the second Accused had agreed to dispense with the down payment, and then came back with the pink plastic bag containing the cannabis are circumstances from which only one inference can be drawn, *viz.* that there was a common intention to traffic in the said dangerous drugs and that the said act of trafficking committed by the first Accused, was done in furtherance of that common intention. Therefore, the second Accused is liable for the act of trafficking committed by the first Accused in the same manner as if the act were committed by him alone by reason of the doctrine of joint liability laid down in s. 34 of the Penal Code.

[Both Accused convicted].

Case referred to:

Namasiyiam & Ors. v. Public Prosecutor [1987] 1 CLJ 540 / [1987] 2 MLJ 336 at p. 344 ***(foll)***

Legislation referred to:

Dangerous Drugs Act 1952, ss. 2, 37(d), (da), 39B(1)(a), (2)
Penal Code, s. 34

For the public prosecutor - N. Rajendran
For the first Accused - Phang Yau Wing; M/s. Phang Yau Wing & Co.
For the second Accused - Paul Liew Chiew Chai; M/s. CC. Liew & Co.

JUDGMENT

John Chong Yik Liong J:

The first Accused, Saddali Bin Sariol, and the second Accused, Mosis Bin Abdul, are jointly tried before this Court on a charge of trafficking in a dangerous drug, and the charge against them, as amended, reads as follows:

> That you, on 8 May 1984, at about 4.30 p.m., at the lane off Jalan Hospital, in the District of Semporna, in the State of Sabah, in furtherance of the common intention of you both, did on your own behalf traffic in a dangerous drug, to wit, 776.78 grammes of cannabis in contravention of the provisions of s. 39B(1)(a) of the Dangerous Drugs Act 1952 (Revised 1983) (Laws of Malaysia Act 234), and that you have thereby committed an offence punishable under s. 39B(2) of the said Act to be read with s. 34 of the Penal Code.

The case for the prosecution is that on 8 May 1984, ASP Lim Chin Tuan (PW6) was at the Semporna Police Station when, at about 11.00 a.m., Cpl (now Sgt) Baharun Bin Banjar (PW5) came together with Sgt Azlan Yong (PW7) and informed him that he had received

information to the effect that two pushers were looking for prospective buyers through a police informer. As ASP Lim was busy then, he told Cpl Baharun that he would like to see the police informer at 2.15 p.m., the purpose being to verify the authenticity of the information.

It is the evidence of ASP Lim, after taking into account his cross-examination and re-examination, that at 2.15 p.m., he went to the Police Station where at the CID office he was introduced to the police informer by Cpl Baharun. ASP Lim then asked Cpl Baharun to leave the room, and spoke to the police informer privately. He asked the police informer about the information, and the police informer told him that his relative, who was also a police informer, had the information regarding two pushers who wanted to sell ganja, and that the two pushers were Filipinos and were known to his relative. Whereupon, ASP Lim called Cpl Baharun and Sgt Azlan Yong into the office and instructed Sgt Azlan Yong to call all available CID personnel in. Sgt Azlan Yong went out and came back with Sgt Peter Fung (PW8), PC Seoloju and PC Ahmad Jailani. ASP Lim then told them that a "buy-operation" would be conducted, in which he would be the buyer; that the police informer was to bring the pushers to meet him at the Rasa Sayang Restaurant at 3.30 p.m., and that they were to lay an ambush. After the briefing, ASP Lim brought the five subordinate police officers and the police informer to a place close to the Muslim cemetery which, according to Cpl Baharun, was connected by a nameless road from Jalan Hospital. There, ASP Lim showed his men the places at which they were to position themselves for the ambush. After this, the party returned to the Police Station where ASP Lim gave another briefing. He instructed his men to take up their positions by 3.20 p.m. and the police informer to leave and look for the pushers at 3.25 p.m. According to Sgt Azlan Yong, before they proceeded to the cemetery, ASP Lim had told them the signal he would use in the ambush; the signal was the scratching of his head and that was the signal for them to come out to effect the arrest.

At about 3.30 p.m., ASP Lim went to the Rasa Sayang Restaurant alone. He went into the restaurant and occupied a table. About 3 minutes later the police informer came. With him were two other persons: one was his relative and the other was Mosis, the second Accused. After the introduction, each of them ordered his own drinks. ASP Lim then spoke to the second Accused in Bahasa Malaysia. He asked the second Accused, "Ada barang?" The second Accused said, "Ada." He asked the second Accused where it was kept and the 2nd Accused said it was kept at Kampung Selamat, adding that he had one kilogramme and that the price was RM700. ASP Lim said it was expensive and asked the second Accused to lower the price, and the second Accused agreed to sell it at RM650 ASP Lim then paid the bill for the drinks. This done, he told the second Accused to bring the "barang" to the Muslim cemetery. The second Accused then left with the police informer's relative and walked towards the town area while ASP Lim and the police informer proceeded to the Muslim cemetery, arriving there at about 3.50 p.m.

According to ASP Lim, at about 4.00 p.m., the second Accused came. With him were the police informer's relative and the first Accused. The second Accused asked him if he could pay a deposit of RM100, but when ASP Lim replied that it was not logical as he might lose his money, the second Accused agreed that no deposit was to be paid. Thereafter, the first Accused and the police informer's relative left while the second Accused stayed behind.

ASP Lim testified that at about 4.20 p.m., the first Accused and the informer's relative came back. The first Accused handed a pink plastic bag, which he was carrying, to ASP Lim who then rested it on the ground and examined its contents. ASP Lim stated that inside the pink plastic bag (Ex. P10) there was a brown paper package (Ex. P11), which he opened and saw in it another pink plastic bag (Ex. P12), which was slightly torn and which he found to contain dried vegetable matter, which he believed to be cannabis. According to ASP Lim, he then signalled his men to come out to effect the arrest by scratching his head, but his men did not come out, and to stall for time he took his money out and counted it. He counted the money twice, and his men were still not out yet. He therefore shouted, "Polis, tangkap", and arrested the first Accused by getting hold of his body. ASP Lim stated that when he

shouted "Polis, tangkap", the second Accused ran away towards the main road while he was getting hold of the first Accused, and that he then heard a gun-shot. The first Accused put up a struggle with him, and PC Ahmad came to his assistance and handcuffed the first Accused. It appears that immediately after this, both Sgt Azlan Yong and Sgt Peter Fung came. Sgt Azlan Yong brought the second Accused, who was handcuffed, to ASP Lim. Sgt Peter Fung picked up the pink plastic bag and the money which ASP Lim had dropped when arresting the first Accused, and handed them over to ASP Lim.

I shall pause at this juncture to refer briefly to the evidence of the other witnesses, namely, Sgt (then Cpl) Baharun Bin Banjar (PW5), Sgt Azlan Yong (PW7) and Sgt Peter Fung (PW8), with respect to this part of the incident, regard being had to their cross-examination and re-examination.

The evidence of these three witnesses shows that at about 3.20 p.m., they proceeded to the place of ambush together with PC Ahmad and PC Seoloju. On arrival, they took up their respective positions. According to Sgt Azlan Yong, about 10 minutes later, ASP Lim and a civilian came and stopped on the road about 30 feet from the cemetery. He was then in the bushes hiding, about 10 to 15 feet from them. Soon afterwards, he saw the two Accused and a man coming to meet ASP Lim. He could not hear what they said. About 5 minutes later, the first Accused and the man left and went towards Jalan Hospital. About 5 minutes later, the first Accused and the man returned, and the first Accused was carrying a pink plastic bag and he handed it to ASP Lim, who then opened it and looked at its contents. Sgt Azlan Yong stated that thereafter he saw ASP Lim scratch his head. He then came out from his hiding place and, as he did so, he heard ASP Lim shout, "Polis, tangkap", and saw the second Accused running away. He fired a warning shot. The second Accused stopped. He grabbed hold of the second Accused, handcuffed him and brought him to ASP Lim. Sgt Azlan Yong also said that before ASP Lim shouted "Polis, tangkap", he saw ASP Lim was holding some currency notes.

The evidence of Sgt (then Cpl) Baharun Bin Banjar, who was lying in ambush at the end of the road to the Muslim cemetery, is that ASP Lim and the police informer arrived at the place of ambush about 5 minutes after he and his four colleagues had taken up their respective positions. They stopped somewhere on the right side of the road. The Sergeant stated that about 5 minutes later, he saw the two Accused and another man walking along the road, and they stopped where ASP Lim was. According to this witness, he could only see the hair on their heads as they were hidden by tall bushes. About 10 minutes later, he saw the first Accused and the man leaving ASP Lim, walking along the road and they went out of his sight after they turned into Jalan Hospital. About half an hour later, he saw the first Accused and the man coming towards the place of ambush, and when they came near where ASP Lim was, he saw the first Accused carrying a plastic bag, but when they reached where ASP Lim was, he could not see what happened. Shortly afterwards, he heard ASP Lim shouting "Police, tangkap!" He came out from his hiding place and ran towards where ASP Lim was, and when he reached there, he found that the first Accused and the second Accused had already been arrested, and that the plastic bag which he saw the first Accused carrying earlier, was now with ASP Lim.

The evidence of Sgt Peter Fung is that he and Sgt Azlan Yong took up their positions in the bush on the right side of the road. He was some 8 feet behind Sgt Azlan Yong. He then saw ASP Lim and a civilian walking towards the cemetery and stop near the end of the road. What followed next, according to Sgt Peter Fung, is that he saw three men coming towards the cemetery. They met ASP Lim, but he could not see what they were doing. Then two of them left in the direction of the main road. Not long afterwards, these two men returned to ASP Lim. One of them had a plastic bag with him and that man handed it to ASP Lim. Sgt Peter Fung said that he could not see what ASP Lim did with the plastic bag, except that not long afterwards he heard ASP Lim shout "Polis, tangkap!" On hearing this, he ran out from his hiding place towards where ASP Lim was, and when he reached there, he saw ASP Lim holding the man who brought the plastic bag. He also saw money as well as the plastic bag on the ground. He picked them up and handed them to ASP Lim after the man was handcuffed. Sgt Peter Fung also said that another person was arrested by

Sgt Azlan Yong, and that that person was the one whom he saw running when he came out from his hiding place.

Now, after the arrest, ASP Lim questioned the two Accused and, as a result of what the first Accused said, took the two Accused to Kampung Banji, followed by his men as well as the police informer and his relative. There, ASP Lim and Sgt Azlan Yong searched a house, but nothing incriminating was found. Thereafter, the police party returned to the Semporna Police Station where, after having made a police report (Ex. P13), ASP Lim handed over to Insp. Abdullah Abu Bakar (PW2) the two Accused, who were subsequently kept in the lock-up, and the pink plastic bag (Ex. P10) together with its contents, that is, Ex. P11 and Ex. P12 (hereinafter collectively referred to as "the exhibits").

I do not propose to go into at length the evidence of Insp. Abdullah relating to the photographing, weighing, packing, sealing and marking of the exhibits for the purpose of their being sent to the Chemistry Department, Kota Kinabalu, for analysis. Suffice it to say that the exhibits were hand-delivered together with a written request (Police Form 31) for analysis (Ex. P4) to the Senior Government Chemist, Encik Khalid Safan (PW1) by Insp. Abdullah on 19 May 1984. The exhibits were examined and analysed by the Chemist who, in addition to his Report dated 28 May 1984 (Ex. P3), testified to the effect that Ex. P12 contained 776.78 grammes of dried vegetable matter, which he found to be cannabis as defined in the Dangerous Drugs Act 1952, as amended by the Dangerous Drugs (Amendment) Act 1983.

Having heard and considered the evidence adduced and the submissions made thereon at the close of the case for the prosecution, I was satisfied that the prosecution had made out a case against both the Accused for trafficking in a dangerous drug in contravention of s. 39B(1)(a) of the Dangerous Drugs Act 1952, which, if unrebutted, would warrant their conviction. There was sufficient evidence to prove that the first Accused was at the material time carrying, and therefore had in his custody or under his control the pink plastic bag (Ex. P10), in which was found the offending exhibit P12 which contained 776.78 grammes of cannabis, a dangerous drug within the meaning of s. 2 of the Dangerous Drugs Act 1952, thereby giving rise to the rebuttable presumption under s. 37(d) that he was in possession of the cannabis and knew it to be cannabis. Paragraph (da) of s. 37, *inter alia*, provides that any person who is found in possession of 200 grammes or more in weight of cannabis shall be presumed, until the contrary is proved, to be trafficking in the said drug. Since the prosecution had, with the aid of s. 37(d), established that the first Accused was found in possession of the cannabis whose weight was more than the prescribed limit, the statutory presumption, therefore, arose against him that he was trafficking in the said cannabis. Moreover, there was also evidence to show or point to the existence of a common intention between the 1st and the 2nd Accused to traffic in a dangerous drug and that the act of trafficking done by the first Accused was done in furtherance of the common intention of both of them, that is to say, in concert pursuant to a pre-arranged plan or arrangement. Accordingly, I called upon each of the Accused to enter upon his defence.

I now turn to consider the case for each of the Accused who were called to give evidence on oath.

The first Accused told the Court that he was 23 years old, having been born on 27 September 1967; that he is a Filipino Bajau and came to Sabah from Mindanau in early 1984, and that before his arrest, he was jobless. He testified that on 8 May 1984 at about 3.00 p.m., he was sitting in a billiard saloon at Semporna, watching people playing billiards when one Tating, whom he had known for about two months, came and asked him where he was going, to which question he replied that he was looking for work, whereupon Tating told him to follow him if he wanted to work. He did not ask Tating what the work was about and Tating did not promise him any money. What happened next, according to the first Accused, is that he was taken by Tating to a theatre where he was told to wait outside while Tating walked away. About 10 minutes later, Tating came back with another man whom he identified as the second Accused. The three of them then walked away from the theatre. While they were walking towards Kampung Banji, he saw two men standing about 50 feet away from the junction. Tating

then said they went to see the two men first before proceeding to Kampung Banji. So they went up to the two men, of whom one was a Chinese. The first Accused alleged that Tating talked to the Chinese, and that after having finished talking with the Chinese, Tating told the second Accused to stay with the Chinese while he and Tating proceeded to Kampung Banji. He added that he only heard Tating ask the Chinese for RM100 which Tating, however, did not get, and that he was about 12 feet away when he heard it.

The first Accused went on to say that after walking for about 10 minutes, Tating went up to a house which was near the main road but not at Kampung Banji, and he was told to wait outside. About 3 minutes later, he saw Tating coming down from the house with a package which looked like a plastic bag, and they headed towards the place where he first saw the two men. He said that after 3 or 4 minutes' walking, Tating passed the bag to him, asking him to carry it, and that he carried the bag until they were some distance, which he stated in cross-examination to be 22 feet from the two men, when Tating took it from him, adding that during the time he was carrying the bag, he did not ask Tating what was inside the bag, nor did he attempt to see what was inside the bag.

The first Accused alleged that after Tating had taken the bag from him, Tating handed it to the Chinese. He said he then saw the Chinese put his hand in his trousers pocket and when the Chinese pulled his hand out, he saw money in his hand. What happened next was that the Chinese, while pretending to give the money to Tating, shouted "Polis." This was followed by exchange of blows between the Chinese and Tating. The first Accused said about six policemen then came, and he was arrested. He added that four persons were arrested - Tating was arrested by the Chinese; he was arrested by one of the policemen named Ahmad bin Jailani, and two other persons arrested were not known to him. Thereafter, they were taken to a vehicle which took them to a kampung. He alleged that Tating led the police to the kampung, and that upon arrival, the four of them were taken to a house where the police conducted a search but found nothing, and thence to the Police Station.

Finally, the first Accused told the Court that in addition to the second Accused, he now knew who the Chinese was, and stated that he was the one who gave evidence in uniform with three pips (by which description he was undoubtedly referring to PW6 ASP Lim Chin Tuan).

Now, the evidence of the second Accused after taking into account his cross-examination and re-examination is that he is a Filipino Suluk, and was born at Bungao, Philippines, on 4 August 1966, He came to Semporna from the Philippines in 1982. After his arrival, he was engaged as a fisherman and lived at Pulau Mabul, which was about one hour from Semporna by 15-horse-power boat, and when he was not at work, he came to Semporna town.

His story is that on 8 May 1984, at about 3.30 p.m., he was in Semporna passing the USNO Building when Tating, who was near a coffee-shop, called him to go for coffee at the coffee-shop. He knew Tating as the latter used to buy fish from him at Kampung Ice Box, Semporna, and so he joined Tating for coffee at the coffee-shop. Sitting at the same table was a Chinese man who was then unknown to him, but who, as he described at this trial, was the one who gave evidence in Court in green uniform with three pips, which description, it is to be observed, pointed to PW6 ASP Lim Chin Tuan. The second Accused said he heard the Chinese asking Tating "Ada barang?" to which question he heard Tating reply "Ada." Thereafter they talked in a low voice and he could not hear them. After he had finished his coffee, he left and went to the theatre to buy cigarettes. He also said when he heard them mention "barang", he did not know what they meant by "barang."

According to the second Accused, what happened next was that while he was buying a packet of 10 cigarettes at the theatre, Tating and the first Accused came, and Tating asked him to go with him. When he asked where they were going, Tating said, "Don't ask, just follow me." So, he followed them, and it appears that it was at or about this time that Tating said, "We are going to Jalan Kuburan." The second Accused said, when they arrived at the place, he saw the Chinese there together with another person, standing by the side of the road that led to the Muslim cemetery.

He alleged that Tating then asked the Chinese for RM100 in these words: "Kasi dulu satu ratus ringgit." The Chinese did not give Tating the money but said, "Tunggu dululah." After this, Tating and the first Accused left. This they did after Tating had asked him to stay with the Chinese and promised to give him RM10 after he returned. The second Accused said he did not know what they were doing, and he was surprised why he should be given money. Nevertheless, he waited at the place.

The 2nd accused stated that about 10 minutes later, Tating and the first Accused came back. The first Accused handed a pink plastic bag, which he was carrying, to the Chinese who then put it on the ground, opened it and looked inside, and then scratched his head. The second Accused said that after this he saw the Chinese counting money, and that after the counting, the Chinese was going to give the money to Tating but the Chinese pulled his hand back and, at the same time, shouted "Police, tangkap" and got hold of the first Accused with his arms while the money dropped to the ground, adding that he then saw policemen come out and arrest Tating.

The second Accused testified that altogether four persons were arrested; that he was arrested last and that he did not run away when the Chinese shouted "Polis, tangkap", notwithstanding his admission that he was arrested after the gunshot was sounded. The other three persons were Tating, the person who was with the Chinese and the first Accused. He stated that after the arrest they were taken in a police vehicle to a kampung whose name he did not know and where he had never been, and that on arrival the police took Tating and the first Accused to a house which the police searched but found nothing therein, adding that thereafter they were taken to the Police Station where they were put in the lock-up.

I shall first deal with the defence of the first Accused. As appears from his evidence, his defence is that it was Tating who took the plastic bag from the house and that he had no knowledge of the contents of the plastic bag which he carried at the request of Tating and only for a short while before Tating took it from him and handed it to ASP Lim. Tating, it is to be noted, is not a fictitious person and is mentioned in the police report (Ex. P13) as "another informer" who was, however, described by ASP Lim throughout his evidence as the relative of the police informer. Now, in considering the defence of the 1st Accused, I bear in mind that the burden of proving his guilt beyond a reasonable doubt rests upon the prosecution throughout the whole trial and that no burden is imposed on him to prove his innocence or prove or disprove anything.

In his evidence the first Accused portrayed himself as a mere innocent momentary carrier of the plastic bag which, as he alleged, was taken by Tating from the house which, as his evidence reveals, was about 10 minutes' walk from where ASP Lim was, and this is what the first Accused said to show that he was a momentary carrier. He said when they left the house, heading towards the place where he first saw ASP Lim and the other man, Tating was carrying the bag, but after 3 or 4 minutes' walking, Tating passed it to him to carry and he carried it until they were some distance from ASP Lim and the other man when Tating took it from him and handed it to ASP Lim. In his cross-examination, the first Accused stated that ASP Lim did see Tating giving him the plastic bag, and that ASP Lim was about 22 feet away when Tating took the plastic bag from him. In this connection, it is pertinent to observe that ASP Lim had, *inter alia*, testified that it was the first Accused who carried the pink plastic bag and handed it to him. His evidence was materially supported by Sgt Azlan Yong, who stated that when the first Accused and the man returned, he saw the first Accused carrying a pink plastic bag and that the first Accused handed it to ASP Lim, and by Sgt Peter Fung, who testified that when the two men came back to ASP Lim, he saw one of them carrying a plastic bag and handing it to ASP Lim; and that on hearing ASP Lim's shout, "Polis, tangkap", he ran out from his hiding place towards where ASP Lim was and saw the man who brought the plastic bag, was held by ASP Lim, whose evidence clearly shows that the man whom he got hold of was the first Accused. However, none of these prosecution witnesses were cross-examined specifically upon the matter now alleged by the first Accused as forming part of his defence. The failure to cross-examine these prosecution

witnesses on this crucial part of the case is tantamount to an acceptance of these witnesses' testimony that the first Accused was the carrier and deliverer of the pink plastic bag containing, *inter alia,* Ex. P12 which was found to contain 776.78 grammes of cannabis, and in addition, it has also adversely affected the credibility of the first Accused on the matter now raised in his defence. Further, the version given by the first Accused was not even supported by the second Accused who testified that when Tating and the first Accused came back, he saw the first Accused carrying a pink plastic bag and handing it to ASP Lim, and this testimony was not even challenged by the first Accused. In the circumstances and for the reasons hereinbefore stated, I have to reject as incredible evidence of the first Accused relating to the matter raised in his evidence which, when considered in the light of the whole evidence, has raised no reasonable doubt in the prosecution case that the first Accused was the carrier and deliverer of the incriminating exhibits.

I now turn to consider the defence of the second Accused. His evidence as to what transpired at the coffee-shop and at the rendezvous near the Muslim cemetery before the temporary exit of the first Accused and Tating from the scene was diametrically different from that of ASP Lim. The second Accused said that at the coffee-shop, at which he joined Tating for coffee at the latter's request, he heard ASP Lim asking Tating, "Ada barang?" and Tating answering, "Ada"; that thereafter he could not hear them as they talked in a low voice; that at the rendezvous to which he was brought, he heard Tating asking ASP Lim for RM100 which Tating, however, did not get; and that thereafter Tating asked him to stay behind with ASP Lim with a promise to pay him RM10. Under cross-examination, the second Accused denied meeting ASP Lim at the Rasa Sayang Restaurant. He said he was brought by Tating to the coffee-shop to have coffee and not to meet ASP Lim, and he denied the conversation alleged to have taken place between him and ASP Lim. He also denied that he was the one who asked ASP Lim for a deposit of RM100. The question I have to decide is whether this defence of the second Accused does raise a reasonable doubt as to the truth of case for the prosecution. In this connection, it is pertinent to note that ASP Lim had testified to the contrary. He said and I quote:

> At 3.30 p.m., I went to the Rasa Sayang Restaurant alone. I went into the Restaurant and occupied a table. About 3 minutes later, the police informer came to me with 2 other persons. The informer introduced these 2 persons to me, one as his relative and the other as Mosis. Mosis is the second Accused in the dock. After the introduction each of us ordered our own drinks. I asked Mosis if he had the thing for sale. I spoke to him in Bahasa Malaysia. I asked him, "Ada barang?" Mosis said, "Ada." I asked him where the thing was kept. He said that it was kept in Kg. Selamat. He told me that he had one kilogramme and the price was RM700. I said it was expensive and asked him to bring down the price. He agreed to sell it at RM650. I then paid the bill for the drinks. I then told Mosis to bring the "barang" to the Muslim Cemetery. The relative of the informer and Mosis left and walked towards the town area. The informer and I walked towards the Muslim Cemetery. We arrived there at about 3.50 p.m. and waited there.
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> At about 4.00 p.m. Mosis, the relative of the informer and another person came to see me. This other person was the first Accused. He is in Court (witness pointing at first Accused). When they arrived, Mosis asked me if I could pay a deposit of RM100. I told him that it was not logical as I might lose my money. Mosis agreed that no deposit was to be paid. When I had this conversation with Mosis, the first Accused Saddali was present. First Accused did not say anything. The first Accused and the relative of the informer left leaving the Second Accused, that is, Mosis, behind.

The above-quoted evidence shows that the second Accused was the negotiator for the sale of the "barang" which, as later events showed, turned out to be cannabis. The evidence of ASP Lim with regard to what transpired between him and the second Accused was hardly challenged, and ASP Lim was not even cross-examined upon the several matters now alleged by the second Accused as forming part of his case. What was put to, and denied by ASP Lim, was that ASP Lim did not talk to the second Accused at the Rasa Sayang Restaurant but was all the while talking to the police informer softly; and that it was the police informer, and not the second Accused, who

asked for a deposit from him. It seems clear that the questions put to and denied by ASP Lim were not referable to Tating who, though named in the Police Report (Ex. P13) as the other informer, was described as the relative of the police informer throughout the evidence of ASP Lim, and this is quite different from what the second Accused now alleges as part of his case. In the circumstances I must say that the failure or omission to cross-examine on the crucial part of the case is tantamount to an acceptance of the evidence of ASP Lim as to what transpired between him and the second Accused, and in addition, it has also adversely affected the credibility of the second Accused on the matters now raised in his defence. Accordingly and for the reasons above stated, I have to reject as untrue this part of the second Accused's story and I am satisfied that his defence has raised no reasonable doubt in my mind as to the truth of the case for the prosecution.

There remains one question for me to decide, that is, whether the prosecution has proved its case beyond a reasonable doubt against both the Accused that they were trafficking in a dangerous drug in furtherance of the common intention of both of them.

As against the first Accused, I am satisfied on the evidence considered as a whole, that the prosecution has proved beyond a reasonable doubt that he was trafficking in 776.78 grammes of cannabis, a dangerous drug within the meaning of the Dangerous Drugs Act 1952, regard being had to the presumptions contained in paragraphs (d) and (da) of s. 37 of the said Act. His evidence, which I have duly considered, has not raised any reasonable doubt as to the truth of the case for the prosecution, nor has it on the balance of probabilities rebutted the presumptions raised against him under s. 37(d) and (da) of the said Act.

As regards the second Accused, the question that arises for determination is whether he is also criminally liable for the act of trafficking committed by the first Accused. The answer to this question depends on whether the act of trafficking committed by the first Accused was done in furtherance of the common intention of both of the Accused, that is to say, in concert pursuant to a pre-arranged plan or arrangement, so as to attract the application of the principle of joint liability laid down in s. 34 of the Penal Code, which reads as follows:

> When a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if the act were done by him alone.

In order to attract the application of the said section, the prosecution must prove

(a) the existence of a common intention to commit the very offence of which the Accused persons are sought to be convicted and
(b) participation in the commission of the intended offence in furtherance of that common intention.

Direct evidence of a prior plan to commit an offence is not necessary in every case, because common intention may develop on the spot and without any long interval of time between it and the doing of the act commonly intended, and thus it may be inferred from the facts and circumstances of the case including the conduct of the Accused, provided that such facts and circumstances point only to that inference: see *Namasiyiam & Ors. v. Public Prosecutor* [1987] 2 MLJ 336 at p. 344.

In the present case there is no direct evidence of common intention. The prosecution, however, relies on circumstantial evidence to raise the inference of common intention to bring home the charge against the second Accused, and it behoves the Court to consider whether the circumstances of this case are such as are sufficient to give rise only to that inference.

The circumstances are briefly these. First, there was the meeting between the second Accused and ASP Lim on the afternoon of 8 May 1984, at the Rasa Sayang Restaurant. A bargain was struck between them for the sale and purchase of the "barang", and the second Accused was asked bring the "barang" to the Muslim cemetery where the deal was to be completed. Next, about half an hour later, the 2nd Accused came to the cemetery together with the 1st Accused and the relative of the police informer, that is, Tating, and asked ASP Lim for a deposit of RM100. Lastly, when told it was not logical, the second Accused agreed that no deposit should be paid, and the

first Accused then left with Tating and returned with a pink plastic bag which the first Accused handed to ASP Lim, and which was found to contain the cannabis. Considering these facts and circumstances as a whole, I have no doubt in my mind that the bargain struck between the second Accused and ASP Lim was about ganja, and that both he and the first Accused worked hand in hand in effectuating the purpose for which the bargain was struck, even though they each played a different role. In my judgment, the fact that the second Accused had requested ASP Lim for a deposit at the cemetery at which the delivery was agreed to be made, and the fact that the first Accused left after the second Accused had agreed to dispense with the down payment, and then came back with the pink plastic bag containing the cannabis are circumstances from which only one inference can be drawn, *viz*. that there was a common intention to traffic in the said dangerous drug and that the said act of trafficking, committed by the first Accused, was done in furtherance of that common intention. Therefore, the second Accused is liable for the act of trafficking committed by the first Accused in the same manner as if the act were committed by him alone by reason of the doctrine of joint liability laid down in s. 34 of the Penal Code. The evidence of the second Accused, which I have duly considered and rejected, has not raised any reasonable doubt in my mind as to the truth of the case for the reasons above stated, I find the two Accused guilty and convict them of the offence as charged.

PUBLIC PROSECUTOR

v.

SALIH BIN ABDUL RAJI

HIGH COURT, TAWAU
TUAN IAN H.C. CHIN JC
[CRIMINAL TRIAL NO. 18 OF 1987]
7 JUNE 1993

DANGEROUS DRUGS: Charge of trafficking - Defence evidence one of denial - Whether sufficient to rebut statutory presumption of possession - Whether defence has rebutted the presumption of trafficking.

CRIMINAL LAW & PROCEDURE: Sentencing - Age of accused - Whether age of accused stated in police report could be received in evidence as proof of age - Whether accused reply to questions as to his age inadmissible as being hearsay evidence.

The accused was charged with the offence of trafficking in 697.41 grammes of cannabis contrary to s. 39B(1)(a) of the Dangerous Drugs Act 1952. The accused was caught as a result of a police ambush and the police officers involved gave evidence to the effect that the accused was seen carrying the briefcase which was subsequently found to contain the cannabis.

The accused evidence was one of denial. He denied being in the vicinity of the catwalk, where the police officers stated they saw him, and he denied that he was carrying a briefcase or that he threw the briefcase away when the police officers identified themselves.

Held:

[1] The fact that the accused threw away the briefcase when confronted by the police officers clearly indicated that the accused was trying to rid himself of something which he knew was going to incriminate him. When this was considered together with the fact that the accused ran away after throwing the briefcase away, it was clear beyond doubt that the accused knew what was inside the briefcase.

[2] The unchallanged evidence of the accused did not rebut the presumption of knowledge nor did they raise any doubt as to the fact that the accused knew that there was cannabis inside the briefcase. The presumptions of possession and trafficking were not rebutted inspite of the fact that the accused may not have been the owner of the briefcase.